JONG CHUK

v.

**CHONG TUNG SANG & ORS;
BACOM ENTERPRISES SDN BHD (THIRD PARTY) (NO 2)**

HIGH COURT SABAH & SARAWAK, KUCHING
MUHAMMAD KAMIL AWANG J
[SUIT NO: KG 104/94/II]
24 NOVEMBER 1998

EVIDENCE: *Witness - Recalling of - Further cross-examination - Whether may be allowed after parties have closed their cases - Discretion of judge - Considerations - Interests of justice - New issues - Prejudice*

CIVIL PROCEDURE: *Trial - Witness - Recalling of - Further cross-examination - Whether may be allowed after parties have closed their cases - Discretion of judge - Considerations - Interests of justice - New issues - Prejudice*

This was a notice of motion by the 6th defendant/third party for the recall of six witnesses for further cross-examination after the plaintiff and the other five defendants had closed their respective cases.

Held:

[1] The doctrine requiring a testing of testimonial statements by cross-examination has always been understood as requiring not necessarily an actual cross-examination but merely an opportunity to exercise the right to cross-examine if desired. Testimony never actually tested at all – in consequence of carelessness, fraud, or incompetence of counsel, or of privity in interest – is admitted, if merely the opportunity so to test it had existed.

[1a] The parties herein had closed their cases, and the 6th defendant had, throughout the trial, been represented by competent counsel who had vigorously cross-examined all the witnesses for the plaintiff and the other five defendants. The various amendments to the pleadings of the parties had also not brought about any new issues. Hence, there was no justification in recalling the said witnesses for further cross-examination. To reopen and to relitigate the case would not serve the interests of justice, but would prejudice the plaintiff and the other five defendants, prolong the trial, waste time and increase costs.

[Motion dismissed.]

Cases referred to:
Cazenove v. Vaughan, 1 M & S 6 ***(refd)***
Ladd v. Marshall [1954] 1 WLR 1489 ***(refd)***
Ong Yoke Eng & Anor v. Lim Ah Yew [1982] 1 MLJ 226 ***(refd)***
Yah Binti Aji v. Fatimah Binti Hj Mohamed Ariffin & Ors [1969] 2 MLJ 186 ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 138
Rules of the High Court 1980, O. 8 r. 3

Other sources referred to:
Civil Procedure, Jeffrey Pinsler, p 673, 674
Cross On Evidence, 5th Australian edn, 1996, p 394, para 17075
Halsbury's Laws Of England, 4th edn, vol 17, para 278
Phipson On Evidence, 14th edn, p 245, para 12-13
Practical Approach To Assessment Of Liability And Damages In Tort, RK Nathan, p 221
Law Of Evidence, Sarkar, vol 2, 14th edn, p 1998

For the plaintiff - Wong Kim Fatt (Albert Tang with him); M/s Chew, Jugah, Wan Ullok & Co Advoc
For the 1st to 5th defendants - Fabian Lim; M/s Lim & Lim Advoc
For the 6th defendant & 3rd party - DP Naban (Malaka Nisau with him); M/s Sulong Matjeraie & Co

Reported by Gan Peng Chiang

JUDGMENT

Muhammad Kamil Awang J:

This is a notice of motion under O. 8 r. 3 of the Rules of the High Court 1980, dated 4 August 1997 (encl. 175) taken out by the 6th defendant/third party (6D/TP) for an order to recall the following witnesses: PW1, PW2, PW3, DW1, DW2 and DW3 for further cross-examination on specific issues as set out in the annexure marked A thereto as follows:

ANNEXURE A

A. WITNESSES FOR RECALL

1. JONG CHUK (PW1)

(a) FURTHER TESTIMONY REQUIRED WITH REFERENCE TO ALLEGATION OF FRAUD

– events leading to the sale of the said land

– events after the sale of the said land

– circumstances which resulted in termination of the relationship between the Plaintiff and the 6th Defendant/Third Party to show that it was not as a consequence of the desire of the 6th Defendant/Third Party to build a water theme park or any other project

(b) FURTHER TESTIMONY REQUIRED IF RE-AMENDED DEFENCE AND COUNTERCLAIM OF 6TH DEFENDANT/THIRD PARTY IS ALLOWED TO STAND

– the above issues

2. CHONG TUNG SHIN (DW1)

(a) FURTHER TESTIMONY REQUIRED WITH REFERENCE TO ALLEGATION OF FRAUD

– events leading to the sale of the said land including why the 1st to 5th Defendants wanted to sell the said land and discussions that arose between them or their representatives and David Goh on behalf of the 6th Defendant/Third Party to show that there was no exercise of fraudulent misrepresentation

(b) FURTHER TESTIMONY REQUIRED IF RE-AMENDED DEFENCE AND COUNTERCLAIM OF 6TH DEFENDANT/THIRD PARTY IS ALLOWED TO STAND

– the above issues

– the performance if any of the contract by the Plaintiff

3. DENIS CHONG SING KONG (DW2)

(a) FURTHER TESTIMONY REQUIRED WITH REFERENCE TO ALLEGATION OF FRAUD

– issues identical to DW1

(b) FURTHER TESTIMONY REQUIRED IF RE-AMENDED DEFENCE AND COUNTERCLAIM OF 6TH DEFENDANT/THIRD PARTY IS ALLOWED TO STAND

– issues identical to DW1

4. CHONG TUNG FATT, JOSEPH (DW3)

(a) FURTHER TESTIMONY REQUIRED WITH REFERENCE TO ALLEGATION OF FRAUD

– issues identical to DW1

(b) FURTHER TESTIMONY REQUIRED IF RE-AMENDED DEFENCE AND COUNTERCLAIM OF 6TH DEFENDANT/THIRD PARTY IS ALLOWED TO STAND

– issues identical to DW1

B. SUBPOENAES ISSUED TO

1. ISMAWI BIN BATU (PW2)

FURTHER TESTIMONY REQUIRED ON ALLEGATION OF FRAUD

– knowledge of contract between the Plaintiff and 1st to 5th Defendants dated 22.10.1991

– knowledge of contract between 1st to 5th Defendants and the Plaintiff dated 25.5.1993

– objective in purchase of said land by 6th Defendant/Third Party

– relationship with 6th Defendant/Third Party

2. ERIC TAN KOK TIONG (PW3)

FURTHER TESTIMONY REQUIRED ON ALLEGATION OF FRAUD

– evidence as to circumstances why 6th Defendant/Third Party intended to terminate its relationship with the Plaintiff.

The motion is supported by the affidavit of the same date of David Goh Swee Chau of 6D/TP. The court had directed that this motion would be heard after 6D/TP had closed its case.

Brief Facts

The plaintiff entered into a development agreement (p. 4 agreed bundle) with the 1st - 5th defendants, who were the original owners of the land. The said land was later sold by the owners to the 6D/TP subject to the development agreement. Subsequently, 6D/TP refused to honour the development agreement and dismissed the plaintiff as the developer.

The plaintiff brought this action against the 1st - 6th defendants, and the 1st - 5th defendants in turn brought an action against the 6D/TP.

It was agreed that these two actions be tried together, and, based on the pleadings, the parties had agreed to be bound throughout the proceedings, by two documents, *viz*:

1. Agreed facts dated 9 November 1996 marked 'A'; and

2. Agreed issues to be tried of the same date, marked 'B'.

The plaintiff and three witnesses gave evidence (pp. 1 - 31 notes of proceeding), and each of the witnesses was cross-examined by both learned counsel for the 1st - 5th Defendants and for the 6D/TP.

After the plaintiff had closed his case, the 1st - 5th defendants (three witnesses) gave evidence (pp. 31 - 61 notes of proceeding) and each of the witnesses was cross-examined by both learned counsel for the plaintiff and the 6D/TP. Throughout the trial 6D/TP was represented by counsel.

The 6D/TP's 11 witnesses gave evidence (pp. 61 - 146 notes of proceeding) and each witness was duly cross-examined by learned counsel for the plaintiff and for the 1st - 5th defendants.

After the plaintiff and the 1st - 5th defendants had closed their cases, the 1st - 5th defendants applied and obtained leave of court to amend the 1st - 5th defendants' statement of claim dated 16 February 1995 against 6D/TP. Following the 1st - 5th defendants' amendment, the plaintiff was granted leave to re-amend his amended statement of claim by including a new sub-para. 26(2) as follows:

> (2) Falsely and/or fraudulently representing to the Original Landowners that the 6th Defendant would honour and abide by the said Agreement and the Deed when it never had any real intention to do so as it had a separate plan to develop the said land into a water/family theme park.

And in the same amendment, as against the 1st - 5th defendants, a further prayer:

> (b) If the court should set aside the Sale & Purchase Agreement between the Original Landowners and the 6th Defendant/Third Party, and set aside the Memorandum of Transfer's therefor, then, for an Order of specific performance of the said Agreement against the Original Landowners, and also for the restoration of the first Power of Attorney and the first caveat.

In the re-amended defence and counterclaim the 6D/TP was allowed to make one consequential amendment in reply to the plaintiff's para. 26(2) in terms of para. 9 reading as follows:

> 9. Paragraph 26 and all the particulars therein of the Re-Amended Statement of Claim are denied and the Plaintiff is put to strict proof thereof. No inducement or procurement surreptitious or otherwise was ever used by the 6th Defendant in the manner alleged or in any manner howsoever or at all. Further, the 6th Defendant makes the following averments:

(a) that the 6th Defendant had approached both the Plaintiff and the Original Landowners in a *bona fide* manner;

(b) that the Original Landowners were willing and intending to dispose of ownership of the said Land;

(c) that the Original Landowners have represented to the 6th Defendant that the Plaintiff required the 6th Defendant to furnish to the Plaintiff a second Power of Attorney on terms identical to the first Power of Attorney in order that the terms and conditions of the said Agreement may be performed,

(d) the second Power of Attorney was granted and executed on the same date as the transfer of the said Land was effected from the Original Landowners to the 6th Defendant;

(e) that there never was a separate plan to develop a water/family theme park;

(f) further or alternatively, if there ever was such a separate plan (which is denied) it is irrelevant to these proceedings.

It must be noted the situation since the application of 4 August 1997 has materially changed. The proposed amendments as on 4 August 1997, which included the issues of breach of agreement and anticipatory breach were disallowed by this court and the Court of Appeal. Thus the then situation does not exist now, but the agreed issues to be tried remain the same.

The plaintiff submitted that item 1(a) of the motion, the events leading to the sale of the said land to the 6D/TP are strictly between the 1st - 5th defendants and 6D/TP. The circumstances relating to the termination of the relationship between the plaintiff and 6D/TP had nothing to do with the plaintiff's amended para. 26(2) to which it had replied in the said para. 9. In any event, the plaintiff had already given evidence on such circumstances and had closed his case. Learned counsel for the 6D/TP had cross-examined the plaintiff (pp. 18 - 20 notes of proceeding).

The 6D/TP should not be allowed to relitigate the matters all over again thereby prejudicing the plaintiff's case and unnecessarily prolonging the trial.

I am of the view that there is already ample evidence before this court, adduced by the parties. There is no new issue, and amended para. 26(2), brought up by the plaintiff's re-amended statement of claim, had been answered by para. 9 of the amended defence and counterclaim of 6D/TP.

It seems to me that the attempt to recall PW1, PW2 and PW3 is nothing more than to mend the 6D/TP's defence ie, to strengthen a weak defence. This is

clearly reflected by the affidavit of David Goh dated 4 September 1998 (encl. 268), especially paras. 5 and 6, which did not arise out of the amendment to para. 26(2) of the re-amended statement of claim. Moreover, these concerned a question of credibility and probative value which will be for the court to decide.

Learned counsel for the 1st - 5th defendants has no objection to the recall of DW1, DW2 and DW3, but submitted that the 1st - 5th defendants' amended statement of claim against the 6D/TP in para. 9.1 does not necessitate the recall of these witnesses.

At the outset of this action, the 1st - 5th defendants had no knowledge that the 6D/TP has no real intention to be bound by the development agreement as per plaintiff's statement of claim, paras. 22 and 23 (encl. 68 para. 20). It was later that the 1st - 5th defendants knew that the 6D/TP had no real intention of being bound by the said agreement.

The issue of fraudulent misrepresentation raised by the 1st - 5th defendants is not a new issue and 6D/TP is not caught by surprise. The 1st - 5th defendants had no knowledge that the 6D/TP has no intention to be bound by the terms of the agreement between the 1st -5th defendants and the 6D/TP. However during the trial of this action it became apparent that 6D/TP had no intention to be bound by the agreement.

The 6D/TP is well aware of the issue raised in paras. 9 and 10 of the amended statement of claim of the 1st - 5th defendants against 6D/TP. There is no element of surprise to the 6D/TP.

The Law

The law on the recalling of witnesses for further cross-examination is clear from decided cases from courts in England and in this country. In *Ong Yoke Eng & Anor v. Lim Ah Yew* [1982] 1 MLJ 226, Arulanandan J said, at p. 227:

> In civil proceedings, it is in the discretion of the court of first instance to recall a witness or call further witnesses after his case is closed. Although under ordinary circumstances it may not be necessary or permissible to allow a witness once examined and dismissed by a party to be recalled for it is expected that the advocate will interrogate him on all material points touching his case, unforeseen situations may develop and there may be also inadvertent omissions. In such a case the court may at its discretion allow a witness to be recalled, but surprise or prejudice to the other party should be guarded against. The objection by the defendant to the application was however not on these anticipated grounds. Nevertheless on allowing the application the court granted

> liberty to the defendant to cross-examine the recalled witness and further witnesses and call evidence in rebuttal.

This passage found expression, word per word in RK Nathan's *Practical Approach To Assessment Of Liability And Damages In Tort*, p. 221. In *Ong Yoke Eng's* case *(supra)* it is noted that the application was made by the plaintiff to recall a witness after the close of the plaintiff's case. The basis of the application was that the witness had omitted to give evidence of a particular matter which was vital to the plaintiff's case.

Jeffrey Pinsler in *Civil Procedure* observed (at p. 673) that a different approach was adopted in an older case of *Yah Binti Aji v. Fatimah Binti Hj Mohamed Ariffin & Ors* [1969] 2 MLJ 186. The defendant made an application after the close of his case to call further evidence which he submitted would be 'decisive'. Chang Min Tat J applied the principles laid down in *Ladd v. Marshall* [1954] 1 WLR 1489, governing the adduction of fresh evidence on appeal. His Lordship held that as the defendant had failed to show that the evidence could not have been 'obtained with reasonable diligence' before hand, it could not be received at this stage.

Pinsler at p. 674 *(ibid)* further said:

> The paramount consideration is whether the exercise of the discretion would be in the interest of justice. In this respect, it is pertinent to note that in *Ong Yoke Eng v. Lim Ah Yew (supra)* Arulanandom J was prepared to receive the evidence even though it had been left out inadvertently. The English High Court took the same line in *Noble v. Noble* [1964] P 250 which concerned a petition for divorce. After the final speeches, an application was made to call the co-respondent upon the issue of collusion. Scarman J allowed the application in view of the need to inquire into the issue. It has also been held that a court has a discretion to admit evidence during the course of the final submissions if this is in the interest of justice.

This is also provided for in s. 138 of the Evidence Act 1950.

In *Phipson On Evidence*, 14th edn, at p. 245, para. 12-13 reads:

> As a rule a party should put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness, or in which he had a share, e.g. if the witness has deposed to a conversation, the opposing counsel should indicate how much he accepts of such version, or suggest to the witness a different one.

In *Cross On Evidence*, 5th Australian edn, 1996, para. 17075 at p. 394 reads:

> The recall of a witness whose evidence is concluded is a matter requiring the leave of the trial judge. The overriding principle applying to that discretionary decision is whether the interests of justice require leave to be granted or refused. The party seeking leave need not show that that party has been taken by surprise. There is no rule that a court will only rarely permit the recall of a witness whose evidence is completed. Ordinarily the interests of justice favour the grant of leave where the evidence sought to be adduced had been overlooked and the other party would not be prejudiced by the fact that the additional evidence is to be given after cross-examination and re-examination of the witness has been completed. On the other hand, sound reasons for rejecting the application might be found in the circumstance that counsel had deliberately refrained from leading the evidence when the witness was being examined in chief in the hope of gaining some tactical advantage, or it appeared that the opposing party would suffer prejudice if leave were granted.

Sarkar's *Law Of Evidence*, Vol. 2, 14th edn at p. 1998 cited Lord Ellenborough LCJ in the case of *Cazenove v. Vaughan*, 1 M & S 6, wherein it says:

> The rule of the common law is that no evidence shall be admitted but what is or might be under the examination of both parties. But if the adverse party has had liberty to cross-examine and has not chosen to exercise it, the case is then the same in effect as if he had cross-examined. Here then the question is whether the defendant had an opportunity of cross-examining." The same rule is stated in Hals 3rd Ed Vol 15 para 800: 'No evidence affecting a party is admissible against that party unless the latter has had an opportunity of testing its truthfulness by cross-examination.' ...
>
> The doctrine requiring a testing of testimonial statements by cross-examination has always been, understood as requiring, not necessarily an actual cross-examination, but merely an *opportunity to exercise the right to cross-examine* if desired. ... This doctrine is perfectly settled. By the present doctrine, testimony never actually tested at all, in consequence of carelessness, fraud, or incompetence of counsel, or of privity in interest is admitted, if merely the opportunity so to test it had existed.

Halsbury's Laws Of England, 4th edn, Vol. 17, para. 278 reads:

> **278. Purpose of cross-examination**. Cross-examination is directed to (i) the credibility of the witness; (2) the facts to which he has deposed in chief, including the cross-examiner's version of them; and (3) the facts to which the witness has not deposed but to which the cross-examiner thinks he is able to depose. Where the court is to be asked to disbelieve a witness, the witness should be cross-examined; and failure to cross-examine a witness on some material part of his evidence, or at all, may be treated as an acceptance of the truth of that part or the whole of his evidence.

This case has taken two years since 1996, and the parties had closed their cases. The 6D/TP had throughout the trial been represented by competent counsel who had vigorously cross-examined each one of the witnesses for the plaintiff and for the 1st - 5th defendants. I find that there is no new issue brought about by the various amendments. The issues remained as stated in the agreed issues marked 'B' and these were known to 6D/TP well before it opened its case. 6DW1, the principal witness, took five days to testify in examination in chief (pp. 49-81) in rebuttal to both the plaintiff and 1st - 5th defendants' cases.

In the circumstances, there is no material upon which the court can exercise its discretion. I see no justification in this motion to recall the several witnesses for further cross-examination. To allow this motion is tantamount to re-open the case, ie, to relitigate the case, which serves no useful purpose. It is highly prejudicial to the plaintiff's case and the 1st - 5th defendants' case. As it were it would allow the 6D/TP to have a second bite of the cherry. It would unnecessarily prolong the trial, a waste of time and increase costs. Of paramount importance, it does not serve the interest of justice to parties in this case. I would, therefore, disallow the motion, and dismiss it with costs to the plaintiff and 1st - 5th defendants in any event.